

Whiteness as International Citizenship in European Union Law

ADAM WEISS — 2 March, 2018



The European Union admits that its Romani citizens – the continent’s largest ethnic minority – are excluded and denigrated. And the EU seems to be trying to do something about it. Yet the consensus is that the EU is failing miserably. One of the most effective critiques of the Union on this point is that the position of Romani people has actually gotten worse since their countries joined and they became European citizens.

Part of the problem may be embedded in EU law. Sarah Ahmed observed that “‘admitting’ to one’s own racism, when the declaration is assumed to be ‘evidence’ of an anti-racist commitment, does not do what it says” (§12). This has an interesting parallel in the European Union Treaties, which declare that the Union shall aim to combat racism but which do not prohibit race discrimination directly. The Treaties, though, do prohibit *nationality* discrimination in a way that does what it says. This prohibition on nationality discrimination may counteract the professed commitment in the Treaties to combating racism, explaining, at least in part, why the Union’s efforts to combat discrimination against Roma are such a failure.

The Treaty on European Union (TEU) declares that “*In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*” (Article 10). Like an admission of one’s own racism, this provision admits the existence of discrimination based on race and ethnicity in Europe. But it does not create any legal effects. If the words “aim to” were struck out, the provision would be performative. Ahmed uses the term “performative” in the sense that J.L. Austin defined it, to refer to utterances that do what they say (e.g. “I now pronounce you husband and wife”); I use it here, in the context of the Treaties, to refer to provisions of the Treaties that have “direct effect”, creating legal obligations by virtue of their inclusion in the Treaties and the way they are worded. In my imagined revision of Article 10 TEU, the Union would have a binding legal obligation to combat discrimination based on racial or ethnic origin; the words “aim to” make the provision too vague to give it that effect, because they deprive it of clarity and precision.

Article 19 of the Treaty on the Functioning of the European Union (TFEU) states that: “[T]he Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age

or sexual orientation". This prohibition of race discrimination is also non-performative, but sets the conditions for a subsequent performative utterance (secondary legislation) by the Union legislature.

These non-performative provisions on race and ethnicity discrimination sit alongside a performative prohibition of another form of discrimination: "*Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*" (Article 18 TFEU). This is as performative as any provision of the Treaties can be, enjoying horizontal and vertical direct effect: individuals can rely in court on the prohibition of nationality discrimination in their relations with public bodies and private individuals. Article 18 TFEU and its predecessor provisions have given rise to voluminous case law on nationality discrimination. Article 18 has a close affinity with Articles 20 and 21 TFEU; they establish Union citizenship and set out the rights associated with it. The prohibition on nationality discrimination and the freedom of EU citizens to move and reside freely anywhere in the Union has led to one of the grandest statements of the Court of Justice of the EU ("CJEU"): "*Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for*".

Article 19 TFEU has not been dormant. The Union legislature has introduced directives which prohibit race discrimination in a wide range of areas including goods, services, education, and social support, as well as in employment. These directives have vertical direct effect – so can be relied on directly against public authorities in court – and must be implemented by national authorities so as to create obligations binding public and private persons. But in practice, like Article 19 TFEU itself, or a white person admitting he is racist, the directives do not really do anything about race discrimination. There are scarcely any cases before the CJEU concerning race discrimination, unlike the extensive case law under Articles 18, 20, and 21 TFEU and the crush of cases arising under EU secondary law on the free movement of citizens within the Union (see here). From the perspective of Romani people, Article 19 TFEU and the directives are completely ineffective. School segregation and other blatant forms of discrimination remain rampant in several Member States. The EU's Fundamental Rights Agency recently reported that Romani people and other ethnic minorities have experienced little improvement in the treatment they face over the past eight years. The European Commission admits the non-performativity of EU and national law in combating discrimination against Roma: "*Many Roma in the EU are victims of prejudice and social exclusion, despite the fact that EU countries have banned discrimination*".

What does it mean for there to be a performative prohibition on nationality discrimination and a non-performative prohibition on race discrimination in an international treaty ratified by States whose populations are overwhelmingly white?

White skin already makes it easy for most EU citizens who move within Europe to fit in wherever they go, inside or outside their country of nationality. The experience that white Europeans have of moving around the EU matches the effects of whiteness described by Ahmed: "*effects that allow white bodies to extend into spaces that have already taken their shape, spaces in which black bodies stand out*". Indeed, Ahmed (§ 59) talks about the privileges of "agency and mobility", terms which would not be out of place in some of the European Commission's communication materials urging EU citizens to exercise their right to free movement. Union citizenship, which is "destined" to ensure

that Europeans are treated equally wherever they go, creates legal rights similar to the social privileges of white skin. European citizenship and the prohibition on nationality discrimination strive to make absolute in international law what white skin facilitates in practice: for EU citizens who “*find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality*” wherever they go in Europe. The performativity of Article 18 TFEU is the legally binding assurance that some other identity will overcome the national differences that separate people from each other. That other identity – European citizenship – has a close affinity with whiteness.

Not only are the prohibitions on race discrimination in the Treaties non-performative; the proposed project of eliminating racial inequality in Europe seems to be undermined by Article 18 TFEU’s active role in enforcing the equality of European people regardless of their nationality. The problem for Roma and other ethnic minorities is not simply that Article 18 TFEU reinforces a white identity that excludes non-white people. Rather, it is that the struggle against race discrimination is ignored in EU law, in favour of a different anti-discrimination struggle (between national and European identities) that, no matter how it is resolved, excludes non-white people.

Indeed, it could be said that right now Article 18 TFEU is in retreat, with national identity fighting back effectively against the promise of European citizenship and the privileges of white skin. To the extent that Brexit is about stopping citizens of other Member States from coming to the UK to enjoy equal treatment there, it represents the triumph of national over European identity. When one prominent Brexiter declared that “*people want to have a fair migration policy that doesn’t discriminate between EU citizens and others*”, it was a rejection of the ideal of European citizenship and a related rejection of common feeling based on white skin. There is so much case law on nationality discrimination before the CJEU precisely because the principle that European citizens should enjoy the same treatment irrespective of their nationality is challenged over and over, often successfully, in relation to access to social assistance and social security benefits.

This is little comfort to Roma. If Article 18 TFEU succeeds, it reinforces an identity that is very close to whiteness, certainly as Ahmed describes it: “*we see it everywhere, in the casualness of white bodies in spaces, crowded in parks, meetings*”. The Europe where Article 18 TFEU is always respected looks a lot like these spaces, where the white privilege of casual access and mobility transcends national borders but still leaves out those who are not white. If Article 18 TFEU fails, and being Bulgarian, Hungarian, or Italian remains more legally significant than being European, this seems just as likely to exclude Roma and other ethnic minorities, who are already defined by contrast to these national-ethnic identities. In EU law, it is simply not possible to play the “race card” as effectively as the “nationality card”, and whoever wins the nationality-card game, it will reinforce an identity that stands in opposition to equality for Roma and other non-white Europeans.

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